STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2006
v	No. 257336 Wayne Circuit Court
CHARLES ROSS, Defendant-Appellant.	LC No. 04-001775-01

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his conviction of aggravated stalking, MCL 750.411i. Defendant was sentenced to two to five years' imprisonment. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant argues that the trial court abused its discretion when it failed to grant his request for a mistrial. We disagree. We review a court's denial of a motion for mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 503 NW2d 497 (1995). Defendant's motion was premised on several unresponsive statements made by the complainant's daughter regarding an allegation that defendant had stolen the complainant's car.

"'A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *Haywood*, *supra* at 228. The error must be more than prejudicial; it must have been egregious and had the effect of denying the defendant a fair and impartial trial. *People v Lumsden*, 168 Mich App 286, 298; 423 NW2d 645 (1988).

While we believe that the testimony cited was prejudicial to defendant, we do not believe that it rose to the level of egregious error that denied defendant a fair trial. It is clear that in each instance cited, the challenged testimony was unresponsive to the line of questioning being pursued.[1] See *Haywood*, *supra* at 228 (observing that "an unresponsive, volunteered answer to a

[1] We note that it was defendant who first put before the jury the issue of defendant having allegedly stolen the complainant's car. Specifically, defense counsel stated in his opening (continued…)

proper question is not grounds for the granting of a mistrial"). Moreover, every time the defendant objected to the testimony, the court struck the response and instructed the jury to disregard it. Further, in its closing instructions, the court stated the following: "At times during the trial, I have excluded evidence that was offered or stricken testimony that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I have let in and nothing else." Juries are presumed to follow the instructions given to them by the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the trial court erred when it admitted hearsay testimony under the excited utterance exception, MRE 803(2). We disagree. The decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). When a question of law exists regarding the admissibility of evidence based on a statute or rule of evidence, this Court reviews such questions de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). "[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Lukity, supra* at 488.

One of the two police officers responding to the scene, in response to a 911 call, testified that the complainant told the officer that "her boyfriend pulled a gun on her." Pursuant to MRE 803(2),"[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an exception to the hearsay rule. However, independent evidence of a startling event must exist for MRE 803(2) to apply. *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989). Strong circumstantial evidence can be used where there is no direct evidence to establish that the startling event took place. *People v Layher*, 238 Mich App 573, 583; 607 NW2d 91 (1999).

Testimony provided by two of the complainant's neighbors provides strong circumstantial evidence that the startling event in issue occurred. One of the neighbors testified that he saw the complainant running up to a neighbor's house, screaming incoherently. The neighbor whose home she ran to testified that the complainant was crying and beating on his door, and that she was holding a handgun when she came into his house. This evidence is sufficient independent proof that the startling event occurred. *Burton, supra* at 295.

Additionally, the testimony establishes that the complainant was still under the shock of the startling event when she made the challenged statement. The officer testified that the complainant was upset, crying, and shaking when he started his interview with her. He also stated that the complainant never completely calmed down during the interview. Clearly, the challenged testimony fell squarely within the excited utterance exception to the hearsay rule. MRE 803(2).

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey

(…continued)

statement, "I guess she thought he had stolen . . . her car."